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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 366

H. P. DUGAN, EDWIN F. SULLIVAN and JAMES M. INGLES,
Petitioners.

vs.

EVERETT G. RANK, et al.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

DECISIONS IN THE COURTS BELOW

Respondents pray for writ of certiorari on the decision of the United States Court of Appeals for the Ninth Circuit rendered March 31, 1961, but to date unreported. Since the rendering of this decision the Ninth Circuit Court of Appeals, on August 14, 1961, has made certain corrections to said decision and has

granted the Petition of the State of California and the Petition of the South San Joaquin Municipal Utility District for a rehearing before the Ninth Circuit Court of Appeals and has denied the Petition of the City of Fresno for a rehearing before said court. Said corrections to said decision and the granting and denying of petitions for rehearing are to be found in the Appendix of Petitioners' Petition and therefore will not be again set forth herein.

The opinion of the District Court is reported in *Rank v. Krug (United States)* in 142 F. Supp. 1, and the decision of the same District Court on the motion of petitioners to strike the original complaint in this case appears as *Rank v. Krug (United States)*, 90 F. Supp. 773. This later decision was cited with approval by this Court in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 70 S. Ct. 955, 94 L. Ed. 1231.

II

STATUTES INVOLVED

In addition to the statutes mentioned by petitioners, we feel that 43 Stat. 702, Sec. 4(B), and 63 Stat. 852, 853, and Article XIV, Sec. 3, California Constitution are pertinent. We have quoted these in Appendix "A" of our Memorandum along with a quotation from 32 Stat. 388, as amended, 43 U.S.C. 491.

III

QUESTIONS PRESENTED

With all due respect to opposing counsel we feel that the "questions presented" as they appear in their brief overlook the fundamental fact here involved, and that is, that the Petitioners as officials and employees of the United States Bureau of Reclamation were acting without authority and in excess of the powers bestowed upon them by Congress in the operation of the Central Valley Project. We submit the questions truly involved herein should be stated somewhat as follows:

1. May a member of the executive branch of the Government be enjoined by the federal courts where his acts are in excess of the powers given him by either the Constitution or Acts of Congress?

2. Is a suit under the Tucker Act the only remedy of a person injured by actions of an official or employee of the United States Bureau of Reclamation where he is acting in excess of the powers given by Congress to the officials and employees of the United States Bureau of Reclamation under a reclamation act authorizing a particular reclamation project?

3. Is it a judicial or administrative function to determine the limits of statutory authority given an administrative officer or employee of the United States by an act of Congress?

It may well be that these questions and those posed by petitioners should be passed upon by this Court, but until the Court below rules on the motion for

rehearings heretofore granted by it, it is impossible to finally make this determination.

IV

STATEMENT

This case involves the United States Bureau of Reclamation's Central Valley Project in California and the efforts of respondents herein to protect and enforce their rights specifically granted to them by the Congress of the United States under that project.

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1. THE CENTRAL VALLEY PROJECT.

The Bureau of Reclamation's Central Valley Project in California has been described in the decisions of this Court in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, and in *Rank v. Krug (United States)*, 90 F. Supp. 773, cited with approval by this Court in *United States v. Gerlach Live Stock Co.*, supra.

As this Court stated in its two opinions the Central Valley of California is a valley 400 miles long and 100 miles wide. The northern portion of the valley has an excess of rainfall and is drained by the Sacramento River. The southern portion of said valley is arid and lacks water and is drained by the San Joaquin River. As also stated by this Court the Central Valley Project "is a gigantic undertaking to *redistribute* principal fresh water resources of California".[1]

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[1] *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728.

(a) Fresno County and Respondent Landowners Along the San Joaquin River Between Friant and Gravelly Ford and Tranquillity Irrigation District.

Briefly stated and stripped of all details the primary purpose of the Central Valley Project as authorized by Congress was, and still is, a project to take water from the water-rich northern part of the Central Valley and redistribute it to existing municipalities in the valley and to furnish a supplemental irrigation water supply to the following six counties in the southernmost portion of the valley, namely, Merced County, Madera County, Fresno County, Tulare County, Kings County, and Kern County.

This redistribution of water to these six water-hungry counties, including the county of Fresno, was the first purpose of the Central Valley Project.

> "Prior to December 2, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land nonriparian to the river, situated both to the north and south of Friant in the counties of *Madera, Merced, Fresno, Tulare, Kings and Kern* in the State of California." (Emphasis ours)
>
> *Gerlach Live Stock Co. v. United States*, 111 Ct. Cls. 1 at 27, Aff. 339 U.S. 725 (1950).

> "7. The plan as formulated by defendant involved the irrigation of a large area of privately owned land nonriparian to the river situated both to the north and south of Friant in the California counties of Madera, Merced, *Fresno*, Tulare, Kings and Kern." (Emphasis ours)
>
> *Wolfsen v. United States*, 162 F. Supp. 403 at 410 (1958).

> "Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve *developed* irrigated lands in an area extending from Madera County on the north to Kern County on the south." (Emphasis ours)
>
> Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935, p. 1.[2]

The redistribution of water under the Central Valley Project was to be accomplished by five major components of the plan. The 4,500,000 acre-foot capacity Shasta Dam on the water-rich Sacramento River was to store the excess waters of the Sacramento; the Delta-Mendota Canal was to bring these stored waters of the Sacramento River to replace the waters of the lower San Joaquin River; Friant Dam was to divert part of its water of the San Joaquin River to Merced, Madera, *Fresno*, Tulare, Kings and Kern Counties of the central valley, and the Madera and Friant Kern Canals were to distribute this water thus diverted by Friant Dam to these six water-thirsty counties.

The Central Valley Project also *specifically* provided that Respondent users of water along the San Joaquin River in Fresno and Madera Counties below Friant Dam and between Friant Dam and Gravelly Ford should be supplied with water under the Central Valley Project.

> "9. (a) *Defendant's plan, as modified, contemplated*, among other things, that the United

[2]The Feasibility Report is set forth in full as Appendix "C" in *Rank v. Krug*, 90 F. Supp. 773 at page 823 thereof.

States should eventually store and divert to non-riparian use the waters of the San Joaquin River originating above Friant Dam and formerly flowing at or below Gravelly Ford, *except for releases from Friant which would be for one or more of three purposes: (1) to satisfy riparian rights between Friant and Gravelly Ford;* (2) to reserve vacant storage space in the reservoir in the exercise of flood control, and * * *." (Emphasis ours)

Wolfsen v. United States, 162 F. Supp. 403 (1958).

"There are certain existing rights downstream from Friant which have to be supplied. Including the riparian rights on the river between Friant Dam and Mendota Pool, * * *."

Plaintiff's Exhibit 121, R. 2284, R. Tr. 3072.[3]

Even the United States Department of Justice in its answer representing the predecessors in office of Petitioners, specifically asked the District Court in their answer to provide these Respondent landowners between Friant Dam and Gravelly Ford with suffici-

[3]In this brief where "R. Tr." is used, it refers to that portion of the Reporter's Transcript which is not in the printed record. The complete record in this case is 50,000 pages. The parties printed the material portion of the record but not all of the record in order to economize. The trial judge was dissatisfied with the record as printed and on the 31st day of March, 1959, in accordance with Rule 75(i), F.R.C.P., ordered the entire remaining unprinted record to be made a part of the record and shipped it to the Ninth Circuit Court of Appeals where it now is. The Department of Justice appealed the District Court's order but did not perfect their appeal and therefore the District Judge's order became final. The unprinted portion of the record was generously quoted from by all parties before the Ninth Circuit. It is respectfully suggested that the entire record be shipped to this Court for the use of this Court.

ent surface water and water out of Friant Dam for percolation to adjacent lands.[4]

Finally Congress specifically provided that sufficient Central Valley Project water should be retained for the watersheds and counties of origin which included Respondent City of Fresno and landowners along the San Joaquin River between Friant Dam and Gravelly Ford under California's watershed and county of origin laws and that only surplus water be exported therefrom.

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* * * *
>
> "* * * the Secretary of the Interior shall make recommendations for the *use of water in accord with state water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future needs."* (Emphasis ours)
>
> 63 Stat. 852, 853 (1949).

The Central Valley Project as authorized by Congress also provided that all San Joaquin River water used for crop lands below Gravelly Ford, such as those of Respondent Tranquility Irrigation District herein, of Fresno County, should be replaced with waters of the Sacramento River.

> "* * * the plan as originally adopted and as carried out by the Bureau included replacement of

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[4]Answer to complaint by R. L. Boke, et al., R. 146 and 147.

all water * * * formerly used for crops * * *." (Emphasis ours)

United States v. Gerlach Live Stock Co., 339 U.S. 725, 740, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

(b) The City of Fresno.

Respondent City of Fresno is the capital of Fresno County. Fresno County is the greatest producer of agricultural crops of any county in the United States. For a number of years the United States Department of Agriculture has listed Fresno County as the greatest producer of agricultural products in the United States. In the year 1959 the county produced agricultural crops of a market value of $390,211,118.00. The Respondent City of Fresno has a population of 133,929.

The City of Fresno is presently supplied with water by pumping from wells, a large part of which wells were supplied by percolating waters from the San Joaquin River prior to the operation of Friant Dam.

The underground water level in Fresno County and particularly in the City of Fresno had been dropping steadily when the Central Valley Project started[5] and has steadily continued to drop.

The Bureau of Reclamation's own witness admitted that the City of Fresno needed an immediate ad-

[5]Plaintiffs' Exhibit 415, "Water Table Hydrograph", R. 2313, R. Tr. 23,342.

ditional surface supply of 100,000 acre-feet of surface water.[6]

Not only was the City of Fresno in drastic need of a supplemental supply of water, and not only was it in the watershed of the San Joaquin River, but Congress, in its enactment of the Central Valley Project had specifically time and time again authorized and re-authorized the Central Valley Project set forth in the original Feasibility Report, and Congress specifically provided for a supplemental water supply out of the Central Valley Project for the cities of the central valley, including the City of Fresno.

> "Prior to December 2, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land non riparian to the river, situated both to the north and south of Friant in the counties of *Madera, Merced, Fresno, Tulare, Kings and Kern in the State of California.** * *." (Emphasis ours)
>
> *Gerlach Live Stock Co. v. United States,* 111 Ct. Cls. 1 at 27, Aff. 339 U.S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

> "The Central Valley basin development * * * includes * * * water * * * for *municipal* and miscel-

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[6] "The Witness. Yes, your Honor. Probably from the underground supply that would be around 30,000 acre-feet and the rest would have to come from the surface * * *.

The Court. He didn't say that. He said they could safely have a supply underground of 30,000 and would need another 100,000 acre-feet."

Testimony of U.S.B.R. Engineer Leland K. Hill, R. 1983.

laneous purposes including *cities* * * *." (Emphasis ours)

United States v. Gerlach Live Stock Co., 339 U.S. 725, 733, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

"The object of the plan is to arrest the flow and regulate the seasonal and year to year variations thereby creating salinity control to avoid the gradual encroachment of ocean water, providing an adequate supply * * * for *municipal* and irrigation purposes." (Emphasis ours)

Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 78 S. Ct. 1174 (1958), 2 L. Ed. 2d 1313.

(c) The Era of Boke and Strauss.

Everything was going fine with the construction and operation of the Central Valley Project under the same great engineers of the Bureau who had constructed Hoover Dam, Bonneville Dam and the other great reclamation projects. The Respondents were relying on the promises of these men and the Acts of Congress guaranteeing them water. Then, like a bolt out of the blue, a group of incompetent and inexperienced men who were not engineers nor administrators nevertheless were installed as Chief of the Bureau of Reclamation and Regional Director of the Central Valley Project. These men, in violation of the original Feasibility Report covering the Central Valley Project and every act of Congress and the interpretations thereof by the federal courts, shortly after their appointment started to ignore Respondents'

rights to the water they were entitled to under the Central Valley Project with particular aversion to Fresno County's rights.

In our discussion of Strauss and Boke we are not attacking these men personally but simply want to point out that they were too inexperienced and unqualified to even begin to handle their respective jobs or to appreciate the magnificent group of engineers they headed, nor to understand the will of Congress in regard to the Central Valley Project. We will only dwell briefly on their lack of qualifications as pointed out by the various committees of Congress.

Immediately upon his employment as Chief of the Bureau of Reclamation, Strauss asked most of the great engineers of the Bureau of Reclamation, like Bashore who had constructed the Central Valley Project and other great engineers of the Bureau of Reclamation like Hoover and Bonneville Dams, to get out. We quote from the testimony of some of these great Bureau engineers given before Congressional committees:

> "Mr. Hodson. Yes; there has been a very quiet but nonetheless bitter controversy raging within the Bureau ever since * * * between the so-called old-time career Bureau people and on their ideas of what the Bureau is supposed to be doing, and the new group which has taken over control and management of the Bureau * * * Mr. Comstock talked to Mr. Bashore in Denver. He said that he was called into the office and given his choice to retire or be *kicked out*—so he retired—and the reasons were he would not go along

on this new thinking and these new plans that the Bureau was putting into effect." (Emphasis ours)

Investigation of the Bureau of Reclamation, Dept. of the Interior, before the Committee on Expenditures, in the Executive Depts., House of Representatives, 80th Congress, 2nd Session, page 746.

Boke, the Regional Director for California, was not an engineer and a Congressional committee made the following finding on his qualifications:

"* * * your committee has reached the conclusions, based on incontrovertible evidence, Mr. Boke does not possess the qualifications necessary to administer the gigantic Central Valley Project."

Investigation of the Bureau of Reclamation, Dept. of the Interior, before the Committee on Expenditures, in the Executive Depts., House of Representatives, 80th Congress, 2nd Session, page 10 (Aug. 4, 1948).

The old Bureau engineers who had successfully designed and constructed the Central Valley Project, Boulder Dam and the other great reclamation projects testified under oath that Strauss had completely wrecked the Bureau's great staff.

"Mr. Blanks. * * * Throughout the period of reclamation history, there has been built up the greatest engineering organization the world has known. It is world-renowned. It is something that the people of this country can well be proud of. It is something that all of us have been proud to be connected with. The engineering organization

under the present administration of the Bureau of Reclamation has been wrecked, practically wrecked, * * *."

Investigation of the Bureau of Reclamation, Dept. of the Interior, before the Committee on Expenditures, in the Executive Depts., House of Representatives, 80th Congress, 2nd Session, page 699.

Strauss, Chief of the Bureau of Reclamation, was equally criticized by old-time engineers of the Bureau and California Senators.[7]

While the respondents herein were attempting to get the water to which they were entitled from the Central Valley Project under the Acts of Congress, Strauss, himself, due to his continual violation of the mandates of Congress admitted that Congress no longer trusted either him, Boke, nor the Secretary of the Interior.

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[7] "Referring to Mike Strauss, Chief of the Bureau of Reclamation over Boke: 'Senator Downey: Mike Strauss: Succeeding Bashore, he stepped down from a higher position so that he could enforce his will more directly. As ignorant of engineering, irrigation, and western conditions as any man could be, with no important administative experience behind his entry into the government service, Mr. Strauss represents the zealot, the politician, the idealogists who lives by the manipulation of propaganda, freely dispatched at public cost; who cares nothing for the truth except how best to obscure it."

Investigation of the Bureau of Reclamation, Dept of the Interior, before the Committee on Expenditures, in the Executive Depts., House of Representatives, 80th Congress, 2nd Session, page 140.

"At the same Salt Lake City Conference (1947) Secretary Krug made the following statements: 'This program is probably closer to my heart than any other in the Department of the Interior and as Mike (Michael Strauss, Commissioner of the Bureau of Reclamation) pointed out to you for some strange reason *people up in Congress don't trust us like they used to* * * *.'" (Emphasis ours.)

Investigation of the Bureau of Reclamation, 19th Intermediate Report of the Committee on Expenditures in the Executive Dept., August 7, 1948, House Report No. 2458, pp. 555-556.

As stated we do not mean to be personal in our comments on these men but to give this court the background of why the will of Congress has been thwarted in illegally excluding respondents from the Central Valley Project.

When Boke took over, although he said nothing, his refusal to act on any application from anyone in the County of Fresno, including the City of Fresno, for water from the Central Valley Project made it clearly apparent he was excluding the City of Fresno and the County of Fresno from the benefit of the Central Valley Project.

Respondents along the San Joaquin River immediately, and on the 27th day of September, 1947, filed suit to protect their rights which suit was later joined in by the City of Fresno.

Boke thereafter negotiated and signed contracts with fifteen irrigation and water districts[8] before he and Strauss were finally removed from office, all of which contracts were signed after respondents had filed suit and with full knowledge of the suit filed by respondents herein against Boke, Strauss and Krug. These fifteen water and irrigation districts voluntarily entered the present action against respondents. Boke consistently refused to give any water to the City of Fresno.

(d) Location of the Lands of the Parties in the Central Valley Project.

At pages 39, 40 and 41 of *Rank v. Krug,* 142 F. Supp. 1, is an excellent map showing the main features of the Central Valley Project including Friant Dam, the Delta-Mendota Canal, the Friant-Kern Canal, the Madera Canal, the areas of percolating water supplied by the San Joaquin River therein referred to as "Lee's Cone Line", the City of Fresno

[8] "

Districts	Date of Contract with Bureau
Delano-Earlimart	8/11/51
Exeter	11/ 8/50
Ivanhoe	9/23/50
Lindmore	2/29/49
Lindsay-Strathmore	8/ 5/48
Lower Tule	5/ 1/51
Orange Cove	5/20/49
Porterville	1/28/52
Saucelito	2/13/51
S. S. J. M. U. D.	10/18/45
Stone Corrall	12/13/50
Terra Bella	10/12/50
Tulare	10/18/50
Chowchilla	7/ 5/50
Madera	5/14/51"

(*Rank v. Krug*, 142 F. Supp. 1, 137 (1956).)

and the lands of all of the defendant irrigation districts in the present action.

V

ARGUMENT

1. REASONS FOR DENYING WRIT.

Although the questions presented in the present litigation are matters of great national importance and probably should be passed upon by this Court. however, on the present state of the record it is submitted that petitioners' writ should not be granted for the following reasons:

(a) The Determination of the Limits of Statutory Authority of an Administrative Agency Is a Judicial Function.

It is submitted that determining the limits of the Central Valley Project and the statutory authority of an administrative agency to arbitrarily exclude a county such as Fresno County and the other respondents herein from the Central Valley Project is a judicial function.

Under the Central Valley Project Congress had provided for furnishing *supplemental municipal* water to the cities of the Central Valley and a *supplemental* supply of irrigation water to the six most southern counties in that valley, namely, Merced, Madera, *Fresno*, Tulare, Kings and Kern Counties. In the present case the Bureau of Reclamation officials arbitrarily and in violation of the laws of Con-

gress are arbitrarily and illegally and without reason therefor attempting to exclude the entire county of Fresno (including respondent City of Fresno) and the farmers along the San Joaquin River between Friant and Gravelly Ford from the benefits of the Central Valley Project. It is respectfully submitted that the determination of the limits of authority of administrative agencies and the limits of large reclamation projects is a judicial question and not a matter for administrative determination.

> "The responsibility of determining the limits of statutory authority of administrative agencies is a judicial function." (Syllabus.)
>
> *Stark v. Wickard, Secretary of Agriculture,* 321 U.S. 288, 64 S. Ct. 559, 88 L. Ed. 733 (Syllabus).

It is respectfully submitted that this Court in its decision affirming *Gerlach Live Stock Co. v. United States,* supra, expressly decided the City and County of Fresno were entitled to participate in the Central Valley Project and in so doing determined the limits of the Central Valley Project and that such a determination was a judicial and not an administrative decision.

> "Prior to December 2, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land nonriparian to the river, situated both to the north and south of Friant in the counties of Madera, Merced, *Fresno,* Tulare, Kings, and

Kern in the State of California." (Emphasis ours.)

Gerlach Live Stock Co. v. United States, 111 Ct. Cls. 1 at 27, Aff. 339 U.S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

"The Central Valley Basin development * * * includes * * * water * * * for *municipal* and miscellaneous purposes including *cities* * * *." (Emphasis ours.)

United States v. Gerlach Live Stock Co., 339 U.S. 725, 733, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

"* * * the plan as originally adopted and as carried out by the Bureau included replacement of all water * * * formerly used for crops * * *."

United States v. Gerlach Live Stock Co., 339 U.S. 725 at 740, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

The respondent riparian and overlying landowners between Friant Dam and Gravelly Ford were also excluded in the Central Valley Project. This was also a judicial determination.

"9. (a) *Defendant's plan, as modified, contemplated,* among other things, that the United States should eventually store and divert to nonriparian use the waters of the San Joaquin River originating above Friant Dam and formerly flowing at or below Gravelly Ford, *except for releases from Friant which would be for one or more of three purposes: (1) to satisfy ripiran rights between Friant and Gravelly Ford;* (2) to reserve vacant storage space in the reservoir in the exer-

cise of flood control, and * * *." (Emphasis ours.)

Wolfsen v. United States, 162 F. Supp. 403 at 410 (1958).

(b) The Fact That Respondents Might Be Entitled to Damages Under the Tucker Act Does Not Bar Respondents From Injunctive Relief.

Petitioners argue that the fact respondents might be entitled to damages under the Tucker Act bars injunctive relief. This is not true. Here the petitioners were acting beyond the scope of their authority. In such a case respondents would not even be entitled to damages since the attempt to take respondents' water rights had never been authorized by Congress.

"The taking of private property for public use by an officer of the United States unless authorized * * * by some act of Congress is not act of Government." (Syllabus.)

Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569 (1952), Aff. 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153.

However, respondents would be entitled to injunctive relief.

"* * * But public officials may become tortfeasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or *in equity,* he is not relegated to the Court of Claims to recover a money judgment. * * *." (Emphasis ours.)

Land v. Dollar, 330 U.S. 731 at 739, 67 S. Ct. 1009 at 1012 (1946).

The Federal Courts on many occasions have enjoined the illegal actions of cabinet members:

United States v. Lee, 106 U.S. 196, 1 S. Ct. 240, 27 L. Ed. 171 (1882);

Land v. Dollar, 330 U.S. 741 (1946), 67 S. Ct. 1009, 91 L. Ed. 1209;

Ickes v. Fox, 300 U.S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937);

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588, 72 S. Ct. 863 at 880, 96 L. Ed. 1153 (1952).

"The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President * * * The Founders of this Nation entrusted the law making power to Congress alone in both good and bad times. * * * this seizure cannot stand."

Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, Aff. 343 U.S. 579 at 588, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

"* * * where he (the head of a department) is directed by law to do a certain act affecting the absolute rights of an individual, * * * the performance of which the President cannot lawfully forbid, * * * it is not perceived on what ground the courts of the Country are further excused *from the duty of giving judgment that right be done to an injured individual*, than if the same services were to be performed by a person not the head of a department." (Emphasis ours.)

Marbury v. Madison, 5 U.S. 137 at 170, 2 L. Ed. 60 (1803).

> "The essence of our free Government is 'leave to live by no man's leave, underneath the law' to be governed by those impersonal forces which we call law. Our Government is fashioned to fulfill this concept so far as humanly possible."
>
> *Youngstown Sheet & Tube Co. v. Sawyer,* 103 F. Supp. 569 at 588, Aff. 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

Neither does the fact that the trial Court ordered a physical solution which involved the building of certain dams prevent the injunctive relief given nor does it constitute administrative action by the Courts.

In the first place petitioners asked that the Court determine the rights to and amount of water of both the riparian landowners and the percolating rights of the overlying landowners and petitioners' predecessors in office, the State of California and the respondents all offered plans for a physical solution as shown by their answer, R. pp. 146-147, and by the letter of Secretary of the Interior McKay, dated March 30, 1953, to the Department of Justice and filed with the Court.

> "* * * I affirm the principle of the defendant officials' plan for a *physical solution in Rank vs. Krug,* with the understanding that in the details of its execution it will be reconciled in so far as practicable with the plan filed by the State of California." (Emphasis ours.)
>
> Defendants' Exhibit A-79-A, R. Tr. 21,975.

Having taken such a position and having asked for a physical solution at the trial petitioners cannot take a new position on appeal.

"* * * generally * * * a theory accepted and acted on by all in the trial court cannot be repudiated in the appellate court."

Sacramento Suburban Fruit Lands Co. v. Melin, 36 F. 2d 907 at 909 (9th Cir. 1929);

Peck v. Heurich, 167 U.S. 624, 17 S. Ct. 927, 42 L. Ed. 302 (1897);

Helvering v. Wood, 309 U.S. 344, 60 S. Ct. 551 (1940);

Delgadillo v. Carmichael, 332 U.S. 388, 68 S. Ct. 10 (1947).

"It is the general rule that courts of review will not consider the questions which have not been raised and tried in the trial court."

Mays v. Burgess, 152 F. 2d 127 (D.C. 1945).

This should dispose of petitioners' objection to the physical solution portion of the District Court's judgment approved by the lower Court.

Moreover, the petitioners and their predecessors in office as officials and employees of the United States Bureau of Reclamation were bound to proceed in accordance with California law.[9]

Since the 1928 California Constitutional Amendment, the Supreme Court of California has required or approved conditional injunctions requiring physical solutions in the following cases: *Peabody v. City of Vallejo* (1935), 2 Cal. 2d 351 at 380, 40 P. 2d 486; *Tulare Irrigation District v. Lindsay-Strathmore Ir-*

[9]Reclamation Act of June 17, 1902 (32 Stat. 388, as amended) (42 U.S.C. 391).

rigation District (1935), 3 Cal. 2d 489, 575, 45 P. 2d 972; *City of Lodi v. East Bay Municipal Utility District* (1936), 7 Cal. 2d 316, 341, 60 P. 2d 439; *Reclamation District No. 833 v. Quigley* (1937), 8 Cal. 2d 183-188, 64 P. 2d 399; *Hillside Water Company v. City of Los Angeles* (1938), 10 Cal. 2d 677, 688, 76 P. 2d 681; *Rancho Santa Margarita v. Vail* (1938), 11 Cal. 2d 501, 558, 81 P. 2d 533; *Meridian, Ltd. v. City and County of San Francisco* (1939), 13 Cal. 2d 424, at page 496, 90 P. 2d 537, 91 P. 2d 105, on petition for rehearing; *City of Pasadena v. City of Alhambra* (1949), 33 Cal. 2d 908, 919, 936, 207 P. 2d 17; *Allen v. California Water & Telephone Co.* (1946), 29 Cal. 2d 466, 484, 176 P. 2d 8.

Moreover, the Federal Courts, as stated, have long enforced decrees of what amounts to a physical solution involving the expenditure of money. Decrees of physical solution requiring the expenditure of money and making physical changes have been made by the Federal Courts, and since the approval of such a decree by the Supreme Court in *Montezuma Canal Co. v. Smithville Canal Co.* (1910), 218 U.S. 371, 31 S. Ct. 67, 54 L. Ed. 1074, the power and duty of an equity court to do so does not seem to have been questioned in the higher Courts. In that case the District Court of the Territory of Arizona, in a decree determining the rights of appropriators, appointed a water commissioner, and required a physical solution by giving him the power to:

> "direct the placing of proper gates, dams or other means for the control of the water of said river at the heads of the canals or other points

on the banks of said canals as he may direct, at the expense of the parties hereto interested herein, and to make such rules and regulations as he may deem proper and expedient, to be observed by the parties hereto, for the distribution and use of said water."

The Court while remanding the case for further proceedings in connection with a question of *res judicata,* nevertheless held that the decree appointing the watermaster with the power indicated, "did not transcend the bounds of judicial authority." See also the Ninth Circuit cases of: *Gila Valley Irr. Dist. v. United States* (1941), 118 F. 2d 507, and *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.,* 245 F. 9 at 29 (9th Cir. 1917).

After all, the appointment of a watermaster by a court for the enforcement of its decrees is essentially no different than the exercise of the power of the federal courts to appoint a receiver, such as for railroads and the like.

> "There is some suggestion that if we undertake an apportionment of the waters of this interstate river, we embark upon an enterprise involving *administrative functions beyond our province* * * * But the efforts at settlement in this case have failed. A genuine controversy exists. The gravity and importance of the case are apparent. The difficulties of *drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution.*" (Emphasis ours.)
>
> *State of Nebraska v. State of Wyoming* (1945), 325 U.S. 589 at 616.

At page 6 of their petition petitioners say that "If this Court does not reverse the decision below, a major phase of the vast and vitally important Central Valley Project will be brought to a halt or materially altered." This is of course not true. The Central Valley Project has been completed and the petitioners are releasing more water down the San Joaquin River below Friant Dam than even their own engineers testified it would be necessary for them to release if the trial Court's plan of physical solution had been carried out. Moreover, as stated, the Secretary of the Interior himself in a letter introduced at the trial by Petitioners' counsel approved a physical solution.[19]

(c) Cases Cited by Petitioners Do Not Sustain Their Position.

Petitioners criticized the Court below in holding that the rights of respondents had not been taken by eminent domain and cited the following cases, viz.:

United States v. Cress, 243 U.S. 316, 329;
United States v. Kansas City Ins. Co., 339 U.S. 799, 811;
United States v. 2,648.31 Acres of Land in Charlotte Co., etc., 218 F.2d 518, 519;
United States v. Lynch, 188 U.S. 445, and
United States v. Gerlach Live Stock Co., 339 U.S. 725.

These cases are clearly distinguishable in that in each of these cases the intended act of taking by the government was clearly set forth in the authorization of Congress authorizing the particular work and in each

[19]Defendants' Exhibit A-79-A, R. Tr. 21,975.

of these cases the act authorizing the installation of works affecting waters clearly described and limited the amount of the property of the abutting landowner taken.

In the present case the landowners were never told that their rights were to be taken. The Bureau had stated they would not take any of the rights of the respondents although they might cut down the flow of the river as long as it left sufficient water in the river to satisfy the rights of respondents.

(d) Reduction in the Flow of the San Joaquin River by Defendants of Itself Does Not Constitute a Taking Under California Law.

Prior to the amendment of the California Constitution in 1928 (Article XIV, Section 3, Constitution of California), each respondent, as a riparian owner along the San Joaquin River or owner of lands overlying percolating water supplied from the river had the right to demand the entire flow of the river past his place. (*Herminghaus v. Southern California Edison Co.*, 200 Cal. 81, 252 Pac. 607.) After the 1928 amendment to the California Constitution, which was adopted solely to further the Central Valley Project, no riparian landowner or any owner of land overlying percolating water supplied by a river could demand the *full* flow of a river past their lands but could only demand the right to water from the river which they could use by reasonable means of diversion and use.[11] That meant that these respondent land-

[11] *Peabody v. City of Vallejo*, 2 Cal. 2d 351 at 380, 40 P. 2d 486 (1935).

owners no longer had the right to prevent a reduction in the flow of the river as they had prior to the 1928 amendment and therefore the mere reduction of the flow of the San Joaquin River by petitioners past their lands did not constitute a taking by eminent domain, but they still have rights to all of the water which they could use for beneficial purposes by means of reasonable diversion and use. The determination of this question is a judicial not an administrative decision.

> "What is a useful and beneficial purpose, and what is an unreasonable use is a judicial question depending upon the facts in each case. Likewise, what is a reasonable or unreasonable use of water is a judicial question *to be determined in the first instance by the Court.*" (Emphasis ours.)
>
> *Gin S. Chow v. City of Santa Barbara* (1933), 217 Cal. 673, 22 P. 2d 5.

The Bureau officials at all times after the authorization of the Central Valley Project consistently represented both publicly and privately that respondents' rights to all of the water of the San Joaquin River which they could put to beneficial use by reasonable methods of diversion would not be interfered with. Mr. Young, Chief of the Bureau of Reclamation, so stated at a public meeting:

> "The Witness. Well, at Sacramento, we met with *Mr. Young*, Hyatt was for the State, Van Etten and Edmundson, Mr. Kelly was the Department of Public Works, I believe, and Webb was the Attorney General at the time, U. S. Webb, I believe it was.
>
> * * *

Q. Well, what did Mr. Young and Mr. Kelly tell you?

* * *

The Witness. We were told we would have a large flow of well-regulated water; that the Government wouldn't take something away from one farmer and give it to another; and they told us always they were taking nothing but the overflow flood water, and we had the best water rights in the country, and they would protect them."

Testimony of Plaintiff J. E. Cobb, R. Tr. pp. 6630, 6632.

In the Bureau's reports to the Congress they consistently represented that they would recognize all of the rights of the riparian owners and of the owners of lands overlying percolating water supplied by the San Joaquin River.

"66.—In addition to respecting all existing water rights, the Bureau in this report has complied with California's county-of-origin legislation, which requires that water shall be reserved for the presently unirrigated lands of the areas in which the water originates, to the end that only surplus waters will be exported elsewhere. Next in importance after the areas having water rights and the counties of origin are the areas now under irrigation systems but needing supplemental water. The water requirements of such areas have also been given priority over the needs of new areas."

Plaintiffs' Exhibit 136, R. 2285, R. Tr. 6570.

This very Court found that the Bureau had so represented to Congress.

"* * *. Moreover, Congress and the water users have been advised that, in prosecution of the work, *existing water rights would be respected.* * * *." (Emphasis ours.)

United States v. Gerlach Live Stock Co., supra, page 740.

Moreover the petitioners in their first answer filed requested the Court to determine the amount of water to which the respondents were entitled, either as riparian owners or as owners of lands overlying percolating waters supplied by the river and for the Court to award such amount of water to the respondents. Their prayer read as follows:

"2. That this Honorable Court determine which lands described in plaintiffs' complaint *are riparian to the San Joaquin River* and are entitled to a reasonable quantity of water for irrigation and domestic use therefrom.

"3. That this Honorable Court determine which lands described in plaintiffs' complaint on file herein have their *underground water strata charged and recharged from the San Joaquin River.*

"4. That this Honorable Court determine *that the lands found to be riparian to the said San Joaquin River shall be entitled to a reasonable quantity of water for beneficial use thereon* for irrigation and domestic purposes, and that sufficient water be allowed to flow in the San Joaquin River to furnish said riparian owners with said supply of water by the use of reasonable means of diversion from the said San Joaquin River by pumps, * * *.

"5. That this Honorable Court determine and adjudge that a live stream shall be maintained at all times between Friant Dam and Gravelly Ford on said San Joaquin River, which said live stream shall at no time be required to be in excess of the natural flow of the San Joaquin River if Friant Dam were not constructed and in operation, which said live stream shall be for the purpose of supplying the said quantity of water for use upon lands riparian to said San Joaquin River and to *supply the underground percolating* waters for lands determined to be entitled to a recharge from the San Joaquin River for said underground waters." (Emphasis ours.)

R. 146-147.

Finally, the Secretary of the Interior himself, Douglas McKay, on March 30, 1953, in a letter addressed to the Department of Justice, a copy of which was introduced in evidence in this hearing,[12] publicly stated that the Bureau would supply all of the water to which the Court found respondents were entitled. In view of the incontrovertible fact that at no time did the Department of the Interior, under which the Bureau operated, nor the Chief of the Bureau of Reclamation take the position that they intended to take the rights of any of the respondents by the operation of Friant Dam, even though the flow in the river might be reduced as they could legally do under the 1928 amendment to Article XIV, Section 3, of the

[12]Defendants' Exhibit A-79 A. R. Tr. 21,975.

California Constitution after obtaining a permit from the California State Water Rights Board to do as they have done, it cannot possibly be said that any rights of these respondents were taken by eminent domain as claimed by petitioners.

Moreover, each of the above cases cited by petitioners were cases involving the navigation powers of the national government—they were not Bureau of Reclamation projects required to be constructed and operated in accordance with state laws as required by the Act of June 17, 1902 (32 Stat. 388) as amended (43 U.S.C. 391).

The case of *New Mexico v. Backer,* 199 F. 2d 426, 428, cited by petitioners at page 16 of their Petition is also not in point. There the power of raising and lowering of the reservoir was expressly given to the Bureau by Congressional act and there was no limitation placed on the Bureau by Congress to provide any certain amount of water in the reservoir for the plaintiffs in that case. Here the respondents between Friant Dam and Gravelly Ford, by Congressional acts, representations of Bureau officials, and Court decisions, had been expressly granted all of the water they could beneficially use and the six counties of the southern part of the central valley were expressly given the water supply, including the City of Fresno, out of the Central Valley Project.

United States v. Gerlach Live Stock Co., 339 U.S. 725, cited in petitioners' brief, stated that that case

only dealt with uncontrolled, wild, uncultivated pasture water which the original Plan of Feasibility and the acts of Congress approving it expressly said were to be taken for the Central Valley Project. However, the *Gerlach* case expressly recognized that the rights of croplands water and controlled grasslands water were not to be taken but should either be supplied or replaced.

> "Prior to December 2, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land nonriparian to the river, situated both to the north and south of Friant in the counties of *Madera, Merced, Fresno, Tulare, Kings, and Kern* in the State of California." (Emphasis ours.)
>
> *Gerlach Live Stock Co. v. United States*, 111 Ct.Cls. 1 at 27, Aff. 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231 (1950).

> "The Central Valley basin development * * * includes * * * water * * * for *municipal* and miscellaneous purposes including *cities* * * *." (Emphasis ours.)
>
> *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 733, 70 S.Ct. 955, 94 L.Ed. 1231 (1950).

> "* * * The plan as originally adopted and as carried out by the Bureau included replacement at great expense of all water formerly used for

crops and controlled grasslands. * * *" (Emphasis ours.)

United States v. Gerlach Live Stock Co., 339 U.S. 725, 740, 70 S.Ct. 955, 94 L. Ed. 1231 (1950).

"9. (a) *Defendant's plan, as modified, contemplated,* among other things, that the United States should eventually store and divert to non-riparian use the waters of the San Joaquin River, originating above Friant Dam and formerly flowing at or below Gravelly Ford, *except for releases from Friant which would be for one or more of three purposes: (1) to satisfy riparian rights between Friant and Gravelly Ford;* (2) to reserve vacant storage space in the reservoir in the exercise of flood control, and * * *." (Emphasis ours.)

Wolfsen v. United States, 162 F.Supp. 403 (1958).

VI

CONCLUSION

We feel that the important issues raised by *all* of the litigants to the present action are so important that eventually a ruling should be made by this Court. However, in justice to the Court below we feel that the Court below was correct in its decision on the points involved in the present Petition for a Writ of Certiorari and in view of that fact, together with the fact that the Court below has not ruled on two motions for rehearing, the Petition should be denied.

Dated, Fresno, California,
September 18, 1961.

Respectfully submitted,

JOHN H. LAUTEN,
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CLAUDE L. ROWE,
Attorney for the other Respondents.

(Appendix "A" Follows)

Appendix "A"

Appendix "A"

"Sec. 8. That nothing in this act shall be construed as affecting or intending to affect or in any way interfere with the laws of any state or territory relating to the control, appropriation, use or destruction of water used in irrigation or any vested right acquired thereunder and the Secretary of the Interior in carrying out the provisions of this Act shall proceed in conformity with such laws."

Act of June 17, 1902 (32 Stat. 388, as amended) (43 U.S.C. 391).

"That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices, and the probable cost of development and he shall have made a finding * * * that it is feasible, that it is adapted for actual settlement and farm homes and that it will probably return the cost thereof to the United States."

43 Stat. 702, Section 4, Subsection B.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, * * *.

"* * * the Secretary of the Interior shall make recommendations for the use of water in accord with state water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future needs."

63 Stat. 852, 853 (1949).

Constitution of the State of California

ARTICLE XIV

Sec. 3. Conservation of water resources; restriction of riparian rights

Sec. 3. It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained. (Added Nov. 6, 1928.)